

HULDA BOUTSEN

IBLA 85-259

Decided February 24, 1986

Appeal from a decision of the Montana State Office, Bureau of Land Management, requiring consent to a reservation of oil and gas in reclamation homestead entry GF 063529.

Set aside and remanded.

1. Mineral Lands: Mineral Reservation -- Reclamation Homesteads

Where BLM reports that land within a reclamation homestead entry is valuable for oil and gas, after satisfactory reclamation final proof has been filed, that report may not be relied upon as a basis for imposition of a mineral reservation unless the Government is prepared to assume the burden, prima facie, that the land is known to be of mineral character at the date of acceptance of final proof. Where BLM issues a decision requiring consent to such a reservation, but the mineral report states the Government will not assume the burden of proving the reservation is proper and the record is unclear whether reservation is proper, the decision will be set aside and the case remanded for action in accordance with 43 CFR 2093.3-3(c)(2).

APPEARANCES: Hulda Boutsen, pro se.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Hulda Boutsen has appealed from a November 30, 1984, decision of the Montana State Office, Bureau of Land Management (BLM), recognizing Boutsen as the assignee of reclamation homestead entry GF 063529 and requiring her to execute a mineral waiver consenting to issuance of a patent for the S 1/2 SW 1/4 NW 1/4, SE 1/4 NW 1/4 of sec. 25, T. 22 N., R. 24 W., Montana Principal Meridian, with a reservation of the oil and gas to the United States.

BLM stated in its decision:

In the absence of executing the waiver, the assignee must furnish conclusive evidence that the lands are not valuable for oil and gas; and, if required, a hearing will be held to make

this determination. A period of 30 days is allowed for the filing of an executed waiver or such evidence. If no action is taken during that time, a patent will issue to Hulda Boutsen for the subject lands with a reservation of oil and gas to the United States as provided in the Act of July 17, 1914 (38 Stat. 509), as supplemented.

In her appeal Boutsen states: "I hereby request a hearing appeal based on unsuccessful exploration for oil and gas in the general area and lack of proof that the area is mineral in nature. My appeal is also based on prior patent issuance policy for lands in the same general area."

Kate Hayes filed a reclamation homestead entry application in October 1911 seeking title to, inter alia, the lands in question pursuant to the Act of April 23, 1904, 33 Stat. 302, as amended. In 1913 she filed satisfactory proof of residence, improvement, and cultivation under the ordinary provisions of the homestead law. She never filed final reclamation proof and did not receive patent to the lands. However, the Act of June 23, 1910, 43 U.S.C. § 441 (1982), authorized such entrymen to assign such entries and "such assignees, upon submitting proof of the reclamation of the lands and upon payment of the charges * * * may receive from the United States a patent for the lands." In this case assignee Boutsen filed satisfactory reclamation final proof on November 19, 1982. On January 4, 1983, BLM requested a mineral report on this land. A memorandum dated February 25, 1983, stated the lands in question, according to "available information," were valuable for oil and gas on November 19, 1982.

[1] Under 30 U.S.C. § 123 (1982), where lands within homestead entries are reported to be valuable for oil and gas, those minerals must be reserved to the United States. Avery S. Hopson, A-30332 (June 24, 1965). However, the regulation applicable in this case, 43 CFR 2093.3-3(c)(2) provides:

(2) In a case where acceptable final proof has been submitted, or a claim has been perfected, and the Geological Survey thereafter makes report, [that the lands involved are in an area in which valuable deposits of oil and gas may occur] * * * such report will not be relied upon as basis for a mineral reservation unless the Government is prepared to assume the burden of proving, prima facie, that the land was known to be of mineral character, at the date of acceptable final proof or when the claim was completed, according to the established criteria for determining mineral from nonmineral lands, among which may be those recognized by the Supreme Court in the case of United States v. Southern Pacific Company et al. (251 U.S. 1, 64 L. ed. 97). If the Government is thus prepared to assume such burden of proof, the Bureau of Land Management will notify the entryman of the mineral classification and that a hearing will be ordered if he manifests disagreement with the classification within a reasonable period. The entryman or claimant will be advised that in the event hearing is had, the burden of proof will be upon the Government; also that, if he shall fail to make answer within the time allowed, the entry or claim and any patent issued pursuant thereto will be impressed with a reservation of oil or gas to the United States.

Therefore, in this case since satisfactory reclamation final proof was submitted prior to the BLM mineral report, the Government has the burden of proving, prima facie, the value of the land for oil and gas as of November 19, 1982, the date of submission of final proof. And the report "will not be relied upon as a basis for a mineral reservation unless the Government is prepared" to assume that burden. 43 CFR 2093.3-3(c)(2).

The BLM memorandum, dated February 25, 1983, specifically states: "The burden of proving, prima facie, that this land was known to be mineral in character as of November 19, 1982, the date when final homestead proof was accepted, cannot be assumed by the government in accordance with established criteria in 43 CFR 2093.3-3(c)(2)." (Emphasis in original.)

Appellant has challenged BLM's assertion that the land was valuable for oil and gas on November 19, 1982. She provides no support for her contention, except general statements that oil and gas exploration activity in the area has been unsuccessful and that other patents for lands in the general area have contained no reservation. The BLM memorandum claims to be based on "available information." However, the record contains no evidence in support of BLM's determination, and BLM states that it cannot assume the burden imposed by regulation. In such a situation the regulation dictates that BLM may not rely on the "report" to impose the reservation.

In light of the paucity of evidence to support either the position of BLM or appellant regarding the value of the land for oil and gas, we will remand this case to BLM for a determination of whether it now can assume the burden imposed by 43 CFR 2093.3-3(c)(2). If it determines that it cannot, patent should issue to appellant without the reservation. If, on the other hand, BLM is prepared to assume the burden, a hearing should be convened at the State Office level at which time BLM will be required to first present a prima facie showing as required by 43 CFR 2093.3-3(c)(2). Appellant shall then be required to overcome that showing by a preponderance of evidence. ^{1/} The official presiding at the hearing shall issue a decision. A decision adverse to Boutsen may be appealed to this Board.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded for action consistent with this opinion.

Bruce R. Harris
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Will A. Irwin
Administrative Judge

^{1/} Should appellant fail to appear and present evidence, patent may issue with the reservation.

